

Initial Guidelines Experiences in Other States

Alabama¹

The impetus for establishing a sentencing commission in Alabama arose from a long history of prison and jail overcrowding, which at times resulted in federal intervention. The commission was formed in 2000. There was originally no appropriation for staff, but the commission was able to move forward with grant funding.

The commission began by collecting data to determine who was being sentenced, to what type of punishment, for how long, and the time actually served. The goal with this data collection was to obtain an overview of current sentencing practices and to determine if those practices were in line with the goals adopted by the Legislature. It was difficult to pull the data together because it resided in several different data systems within the state, and because some of it was available only in paper records.

The analysis revealed two deficiencies: lack of truth in sentencing and disparity in sentencing. With regard to truth in sentencing, it was determined that the time actually served bore little relationship to the sentence pronounced in court. This was due to a combination of discretionary parole practices, generous good time credits, and the use of split sentences. With regard to disparity, the Commission found that similar offenders convicted of similar crimes were receiving very different sentences. Additionally, the decisions to sentence an offender to prison versus probation and the lengths of prison sentences varied dramatically from court location to court location.

The Commission ultimately made several recommendations to the legislature for large-scale reform; development of voluntary sentencing guidelines was just one of those changes. A voluntary model was chosen so as to permit “meaningful judicial discretion,” and thus avoid the criticism of the federal guidelines, which they perceived had placed greater constraints on judicial authority. The Commission proposed to roll out the guidelines in two phases. First the Commission would develop a set of recommended sentencing standards addressing both the prison decision and length of term. These standards would be based on historical sentencing practices, with adjustments made by the Commission to reflect the goals of the Legislature. During this period, parole would be retained. Following a period of implementation, the Commission would propose a second set of guidelines that would operate under a model where parole would be abolished and good time eliminated. The reason for this two-phased approach was a practical one. The actual sentences pronounced in Alabama were very high, whereas the data analysis showed that actual time served was very low. In order to achieve truth in sentencing, the time served would have to increase or the actual sentences pronounced would have to decrease. Neither approach could be practically implemented immediately, so the decision was made to start with voluntary sentencing standards that would be both historical and prescriptive.

¹ Sources: Alabama Sentencing Commission, *Initial Report to the Legislature* (Jan. 7, 2002); Alabama Sentencing Commission, *Recommendations for Reform of Alabama’s Criminal Justice System* (May 10, 2003); Alabama Sentencing Commission, *2013 Report* (2013); Phone Call with Bennet Wright, Executive Director, Alabama Sentencing Commission, 9/22/16.

The Alabama Commission worked with the Vera Institute to develop its initial sentencing standards. The Commission was presented with information about all of the different systems then in existence. The Commission also looked at historical sentencing data, and then adjusted those findings to better meet the policy goals of the Legislature (making them partially prescriptive). They chose to utilize sentencing worksheets rather than sentencing grids because they felt the grid approach was too robotic and mechanical. The worksheet system appealed to the Commission because it would force a review of all of the individual factors relevant to the sentencing decision. Unlike Virginia, which utilizes multiple worksheets for 15 different offense categories, Alabama chose to go a simpler route by developing just a few worksheets. There are four major worksheet categories: Personal, Drug, Property, and Property A offenses. Within each category a worksheet is first utilized to determine whether prison or probation is the appropriate sentence. If prison is appropriate, a second worksheet is used to determine the length of term. By 2012, it was apparent that a fully voluntary system was not going to reduce prison overcrowding to the degree needed, so the Legislature directed the commission to develop presumptive standards for non-violent (drug and some property) offenses. Those standards were promulgated in 2013. The presumptive standards have been more effective in helping to control the prison population because they place limits on the court's ability to depart from the recommended sentence.

Kansas²

The Kansas sentencing commission was formed in 1989. One of its original mandates was to study whether racial bias was present in sentencing. The Commission collected data on sentencing and prison stays to gain a picture of both how sentences were issued and actual time served. Some of the major findings from this study revealed that that non-white offenders received prison more often than white offenders, and that non-white offenders received longer prison sentences. This held true even for offenders who had no prior record; thus criminal history did not explain the disparities. Additionally, the pattern continued in the context of the parole release decisions, with non-white offenders being held longer than white offenders. These and other findings led the Commission to conclude that systemic bias existed in Kansas, and that the solution was to change the system used to make sentencing and release decisions (establish a level playing field). Sentencing guidelines were seen as a major component of this new system. It should be noted that the Commission had also keyed into the fact that many property crimes were categorized by the legislature as more serious than many violent crimes; guidelines were seen as a way to correct these disparities as well.

The Kansas guidelines utilize a sentencing grid with offense seriousness and criminal history serving as the primary axes. In determining the offense seriousness levels, the Commission engaged in an exercise to rank each crime. The primary determinant as to the seriousness of an offense was harm. In determining the extent of harm, the Commission was guided by three principles: (1) society's greatest interest was to protect individuals from emotional and physical injury; (2) the second most important interest was to protect private property rights; (3) the third interest was to protect/preserve the integrity of governmental institutions, public peace, and public morals. Utilizing these principles, the Commission organized offenses into 10 severity

² Source: Kansas Sentencing Commission, *Recommendations of the Kansas Sentencing Commission* (1991).

levels, which they felt was a more refined classification system than then existed in statute. It should be noted that each of the crimes was classified based on the “typical” offense.

In developing a criminal history score, the Commission discussed the theoretical issues of criminal history as a predictor of risk of future offending versus as an indicator of culpability due to prior involvement with the criminal justice system. The Commission determined that because the underlying theory of the guidelines was “just desserts,” the Commission would focus on criminal history as an indicator of culpability. The Commission considered many questions in developing its scoring system, including which prior offenses to include, whether they should be allowed to decay, and whether the prior offenses should be weighted. The Commission held public hearings to receive input on these questions and studied the scoring systems in other states. Ultimately, the Commission chose to adopt a categorical criminal history system similar to that in Oregon because it was based on both quantitative factors (the numbers of prior convictions) and qualitative factors (the seriousness of those convictions).

The newly developed guidelines resulted in lower sentences for property offenders. As a result, the Commission recommended that the guidelines be applied retroactively to persons already sentenced. Along with their recommendations for the implementation of sentencing guidelines, the Commission recommended other changes to the system, including changes to the way good time would be calculated. Additionally, rather than recommend that the Parole Board be eliminated, the Commission recommended a change to their duties. The Parole Board would continue to make release decisions for life sentences. As to all others, their responsibility would be to establish and revise release plans and to handle violations and revocations of post-prison release conditions. Today, this entity is the Prisoner Review Board.

Minnesota³

Minnesota began the development of the guidelines by conducting two studies: one that analyzed sentencing decisions, and one that analyzed the releasing practices of the Parole Board. When studying sentencing, they sought to identify factors that were important to the decision of whether to impose prison or community sanctions. And when studying paroling practices, they sought to identify factors that were important to the Parole Board in determining the length of time that prisoners would serve. They found through these studies that offense severity and criminal history were critical to the initial sentence and offense severity was critical to the release decision. Thus, they decided to develop a sentencing grid with these two dimensions forming the primary axes.

To develop the offense severity scale, members of the Commission engaged in an iterative exercise to rank a majority of felony offenses. These rankings formed the basis of the 10 groups that comprised the original severity levels on the grid (now there are 11). To develop the criminal history score, the Commission’s data analysis revealed core variables that should be included: prior felony convictions and juvenile adjudications and whether the offender was on probation or parole when the offense was committed. The Commission then chose to also

³ Sources: Minnesota Sentencing Guidelines Commission, *1980 Report to Legislature* (1980); Phone call with Kay Knapp, former Director and Research Director of the Minnesota Sentencing Guidelines Commission, 9/21/16.

include prior gross misdemeanor and misdemeanor convictions as a matter of policy, even though they had not been shown to be significant in the data study. Additional detail about the ranking exercise and subsequent decisions as to where to recommend probation versus prison and development of the lengths of term can be found in the 1980 Report to the Legislature, which was provided with the Robina materials.

Before the draft guidelines were finalized, the commission did a listening tour around the state to present the guidelines and principals and heard comments, criticisms and suggestions. The guidelines were modified slightly as a result. After the guidelines were submitted to the Legislature and allowed to go into effect, the guidelines were presented to the professional groups. The presentations were led by the groups' respective commission members. Commission staff helped in training on the new processes and procedures.

When the sentencing guidelines were implemented in Minnesota, parole was also abolished in favor of truth in sentencing, which required that individuals serve the sentenced pronounced subject to good time credits that would equal no more than 15% of the sentence. (This was later changed to a formula whereby prisoners serve 2/3 of their sentence in prison and 1/3 on supervised release, subject to additional time in prison for disciplinary violations.) The guidelines were not implemented retroactively, however, so there was a population already in prison that would continue to be subject to parole release. For this reason, the Parole Board was not immediately abolished.

Following implementation of the guidelines, the Parole Board was tasked with reviewing all active prison cases in light of the new sentencing standards to see if the targeted release date should be adjusted. After reviewing about 1500 cases, the Board adjusted the release date for a small number of offenders (about 95). Following that, the legislature enacted a law allowing prisoners to seek review of their sentences by the court under a post-conviction relief procedure. There was wide agreement within the criminal justice system (prosecutors, public defenders, probation officers, and the courts) that the reason the guidelines had been enacted was to bring equity to the system, so it was thought that it would be a matter of equity to perform these reviews for offenders who had been sentenced without the benefit of the guidelines (though a few judicial districts refused to do so). About 300 cases were resentenced through this process over a period of a couple of years.

By 1982, a large majority of prisoners who had been sentenced prior to the guidelines had been released, so it was determined that the Parole Board was no longer needed, and the Legislature disbanded it. The Department of Corrections assumed authority for the release of any remaining offenders sentenced under the indeterminate system. The Parole Board had already set a target release date for all of the offenders, so the DOC primarily followed that recommendation. Minnesota already had the same supervision agents working with probationers and parolees, so there was no real transition needed in this area, except that rather than supervising parolees, these officers were now supervising prisoners released on "supervised release," which was simply the balance of the term after serving the minimum required amount.

Pennsylvania⁴

Pennsylvania implemented sentencing guidelines, but retained parole. There is rarely discussion or thought in Pennsylvania about eliminating parole.

Prior to implementation of the guidelines, judges would issue a sentencing range. The maximum would be double the minimum term pronounced. The parole board would review for release at the minimum and prisoners were on average serving 102% of the sentence. The impetus for guidelines was to bring uniformity to sentences. Certain areas within the state were using probation or very short sentences for very serious crimes. The goal was to discourage these practices and to increase sentences for serious crime.

The guidelines were well-received. The guidelines set the minimum sentence, and then the judge has a limited amount of discretion to set the maximum sentences subject to the doubling rule. With implementation of the guidelines, the minimum is typically sentence served. There have been time following high profile cases when the actual time served approach 130-140% of the minimum, but that has leveled off and actual time served is back in the 100-112% range.

In a system that retains parole, it is important to make sure both the front end (sentencing) and the back end (parole) are coordinated. If there is inconsistency in either area, it will be hard to predict the actual impact on the prison population, and the state will not be able to adequately plan for needed resources. Pennsylvania formed a Prison Projection Committee comprised of representatives from the Commission on Sentencing, Parole Board, and Department of Corrections to facilitate this type of sharing.

Washington, D.C.⁵

Washington, D.C. is a unique jurisdiction. In the late 1990's, the district was facing a financial crisis necessitating federal intervention. The federal government assumed financial responsibility for the courts, pretrial services, and court services and offender supervision. The tradeoff was that D.C. would have to move to a truth in sentencing model. This change came in the form of the National Capital Revitalization and Self-Government Improvement Act in 1997, in which Congress required that determinate sentences be imposed for a specific subset of felony offenses, and that offenders be required to serve at least 85% of the imposed sentence, followed by an adequate period of supervised release. This essentially meant that parole had to be eliminated for these offenses. The D.C. Sentencing Commission was created to advise the D.C. Council in implementing these laws and making the transition from an indeterminate to determinate sentencing system.

⁴ Source: Phone call with Mark Bergstrom, Executive Director of the Pennsylvania Commission on Sentencing.

⁵ Sources: D.C. Advisory Commission on Sentencing, *Criminal Sentencing Practices 1993-1998* (Sept. 30, 1999); D.C. Advisory Commission on Sentencing, *2000 Sentence Recommendations to the Council of the District of Columbia* (April 5, 2000); D.C. Advisory Commission on Sentencing, *2002 Annual Report* (Nov. 27, 2002); D.C. Advisory Commission on Sentencing, *2003 Annual Report* (Nov. 30, 2003); Fredrick H. Weisberg and Kim S. Hunt, *Voluntary Sentencing Guidelines in the District of Columbia: Results of the Pilot Program* 19 Fed. Sent. R. 208 (2006-07); Phone call with Kim Hunt, U.S. Sentencing Commission.

Because the Congressional Act had created a binary sentencing system in which some offenses were subject to determinate sentences and some were subject to indeterminate sentences with parole release, the Sentencing Commission quickly recommended that the D.C. Council instead take the approach of establishing a unitary determinate sentencing system. The Council followed this recommendation and abolished parole for the remaining offenses, effective August 2000. The U.S. Parole Board assumed responsibility for any offenders for which parole release was still needed.

The Commission worked with the Urban Institute to study sentencing practices. Specifically, they sought to determine the length of sentences imposed, the length of sentences served, and the proportion of offenders who were released at the point of first eligibility for parole. The Commission had particular difficulty in determining the actual length of stay. For this reason, they decided not to recommend an immediate move to guidelines, but rather to wait awhile so they could study the sentencing practices after the move to the determinate system to see if sentencing disparity developed and if there were any other unintended consequences of the shift. When the data analysis was complete, it showed variability in sentencing across all crime categories, not all of which could be explained by legitimate sentencing factors related to the offense or offender.

After review and discussion, the commission decided to develop a set of voluntary guidelines. They chose voluntary because they felt this was the best approach for achieving high compliance while avoiding litigation. The Commission started with a set of guidelines that had been developed in the 1980's but never approved and used their data study to establish the values within the grid. In establishing sentence lengths, the Commission chose to be descriptive, basing the ranges on historical sentencing patterns, but they also focused the ranges in on the middle 50% of sentences so that the ranges would better represent typical cases. Development of offense rankings was an iterative exercise. The ranking of offenses was guided by historical data on sentences imposed, practitioner views of the "ordinary" case (that is, the "ordinary" offender committing the crime in the "ordinary" way), the harm to victims and the community, the statutory penalties prescribed for each offense, and by commissioners' intuitive sense of the relative severity of the offense. Ultimately the Commission recommended that drug offenses be ranked into three categories on a separate sentencing grid, and that all other offenses be ranked into nine categories on the master sentencing grid.

Implementation was fairly easy. Since all of the judges in D.C. work in a single courthouse, there was good communication, and it was easy to set the expectation that sentencing would be in accord with the guidelines.

Virginia⁶

The Virginia Sentencing Commission was established in 1994, with a charge to develop discretionary sentencing guidelines. The primary goal of the sentencing guidelines was to reduce unwarranted sentencing disparity. As the commission notes in its sentencing guidelines manual,

⁶ Source: Va. Sentencing Guidelines, Introduction (eff. July 1, 2014).

“when sentencing varies dramatically, no reasonable expectation exists of what the actual penalty will be for a crime.”⁷

In developing the guidelines, commission staff first analyzed sentencing decisions for the five-year period from 1988-1992. They then analyzed actual time served for offenders released during the same period. The analysis revealed that the offense and offender factors considered at the time of sentencing varied by offense. Thus, when developing their sentencing guidelines, the commission organized offenses into 15 groups, and then developed worksheets containing the most salient factors relevant to sentencing for each offense group. The factors on each worksheet result in a score, and the score determines the recommended range for that sentence.

Initially all recommended sentences under the guidelines were based on historical sentencing practices. But over time, the legislature imposed higher minimum sentences for certain offenses or categories of offenses, so the guidelines have been adjusted upwards in places to account for these changes.

The guidelines as they were first implemented appeared to carry much lower sentences than had existed in the state prior to the elimination of parole. However, under the parole system, the court would order a very high sentence, and that term would often be dramatically reduced by parole and good conduct allowances. Under the guidelines, in contrast, the sentence pronounced by the judge represents the actual time to be served, less no more than 15% for earned sentence credit. The perceptual differences in the lengths of term pronounced before and after implementation of the guidelines did cause problems at first. However, the Commission was consistent about its messaging, pointing out that the sentences previously announced were never what was served but that the guidelines system ensured that the sentence pronounced would be the sentence served.

⁷ *Id.* at Introduction p. 1.